



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 13, 2004

Mr. Jose R. Guerrero  
Montalvo & Ramirez  
900 North Main  
McAllen, Texas 78501

OR2004-8707

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210972.

The La Joya Independent School District (the "district"), which you represent, received a request for information regarding the handling of funds received from district football games during the 2003 through 2004 school year, any allegation of sexual harassment asserted by a named individual against the requestor's client, and any information regarding the job performance of the requestor's client. You state that some responsive information, including pages marked 1 through 11 in Exhibit B, will be released to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a)(1) excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See Gov't Code* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). The submitted information consists of both the district police department's criminal investigation and the district's internal administrative investigation. We note that section 552.108 is generally not applicable to information relating to an

administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). In this instance, you inform us that the district police department's investigation pertains to a pending criminal prosecution by the Hidalgo County Criminal District Attorney's Office. Furthermore, you inform us that portions of the internal administrative investigation also relate to the criminal investigation and prosecution. Upon review, we conclude that release of portions of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, we agree that section 552.108(a)(1) is applicable to the remaining portions of Exhibit B and the red-marked information in Exhibit C, and it may be withheld on this basis.

Next, we address your claims under section 552.101 for the remaining information in Exhibit C. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation into allegations of sexual harassment. *See Ellen*, 840 S.W.2d at 525. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We further note that common-law privacy does not protect

information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

We find that the remaining submitted information does not include an adequate summary of the investigation. Therefore, you must generally release all of the remaining submitted information in Exhibit C, except for the marked information that identifies the alleged victim and the witnesses of sexual harassment. That information must be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

We note that some of the remaining submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the district must withhold the section 552.117 information of a current or former official or employee who elected under section 552.024, prior to the district's receipt of this request, to keep that information confidential. The district may not withhold such information under section 552.117(a)(1) for an individual who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.<sup>1</sup>

In summary, the district may withhold the remaining portions of Exhibit B and the red-marked information in Exhibit C pursuant to section 552.108(a)(1) of the Government Code. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district must withhold the information we have marked under section 552.117(a)(1) if it pertains to an employee who made a timely election pursuant to section 552.024. The remaining information must be released to the requestor.<sup>2</sup>

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<sup>1</sup> We note that the remaining submitted information includes other information that would normally be excepted from disclosure pursuant to section 552.117(a)(1). In this instance, however, the information in question implicates the privacy interests of the requestor's client. Because the requestor has a special right of access to his client's private information, such information may not be withheld from the requestor under section 552.117. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the district receive another request for this same information from a person who would not have a right of access to it, the district should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

<sup>2</sup> As our ruling is dispositive, we do not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Debbie K. Lee', with a stylized flourish at the end.

Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/seg

Ref: ID# 210972

Enc. Submitted documents

c: Ms. Leslie McCollum  
O'Hanlon & Associates  
808 West Avenue  
Austin, Texas 78701  
(w/o enclosures)